

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

FILED  
RICHARD W. NAGEL  
CLERK OF COURT  
2019 MAR 18 PM 2:27  
U.S. DISTRICT COURT  
SOUTHERN DIST. OHIO  
WESTERN DIV. DAYTON

DERRICK L. JOHNSON,  
Petitioner,

Case No.: 3:15- CV - 090

-Vs.-

CHARLES BRADLEY, Warden,  
Respondent.

HONORABLE JUDGE  
WALTER H. RICE

MAGISTRATE JUDGE  
MICHAEL R. MERZ

OBJECTIONS TO THE MAGISTRATE JUDGE  
REPORT AND RECOMMENDATIONS

This case is before the court on Petitioner's, March 4<sup>th</sup> 2019 Motion to Strike (ECF NO.86) where petitioner respectfully ask this court to Strike its previous order adopting Magistrates Third supplemental report and recommendation that was filed on February 15<sup>th</sup> 2019 (ECF No.82).

This case has a lengthy procedural history. On January 23<sup>rd</sup> 2019 the magistrate Judge Merz filed a Third Supplemental report and recommendation and served Petitioner the same day thereof. Petitioner asserts after receiving the Magistrates Report and Recommendation on January 28<sup>th</sup> 2019, the very next day on January 29<sup>th</sup> 2019 Petitioner filed a Motion for extension of time to respond to the Magistrates Report & Recommendation. (ECF No. 83)

Notably; Without this Honorable Court's awareness of the current dates above, this Honorable court on February 15, 2019, issued an order adopting the Magistrates Report and recommendation that was issued on the 23<sup>rd</sup> 2019 (ECF No. 82). Magistrate Judge Merz denied

Petitioner's Motion for leave for extension of time after Judge Rice adopted (ECF No. 84) Third Supplemental Report and Recommendation.

Petitioner asserts had the Court been aware that the very next day of receiving the Magistrates Report & Recommendation January 28<sup>th</sup> 2019, Petitioner responsibly filed his Motion requesting extension of time on January 29<sup>th</sup> 2019. Without this knowledge the court on February 15<sup>th</sup> 2019 issued a dismissal.

Thereafter, on March 4<sup>th</sup> 2019 Petitioner request the court grant his 'Motion to Strike' (ECF No. 86) based on the court's unawareness of Petitioner's January 29<sup>th</sup> 2019 Motion requesting extension of time. Theses dates are crucial to Petitioner' request and good cause was shown.

**Petitioner's extension of time was filed twenty (20) day's before the February 9<sup>th</sup>, 2019 due date.**

Petitioner, Johnson contends that he filed his Motion for extension of time twenty(20) day's before the February 9<sup>th</sup>, 2019 due date, and his Motion to strike (ECF No. 86) should be granted.

Petitioner, contends that a party may be entitled to an extension of time to file objections under certain circumstances, such as when a request for an enlargement of time is timely made, the time requested is not extraordinary, sufficient reasons are stated to support the enlargement, there is some possibility of a different outcome, and there is little delay in filing the actual objections. See Williams v. Meyer, 346 F. 3d 607, 613-14 (6<sup>th</sup> Cir. 2003) (granting a Fed. R. Civ. P.60(b) Motion in order to permit an extension of time for a party to file objections to the Magistrate Judge's report); see also Fed. R. Civ. P. 6(b) (allowing enlargement of time for cause if requested within original time allotted).

**Magistrate Judge Merz stated that asking the Court for leave for an extension of time is not the same as getting time, and a litigant is not to assume that his extension would be granted.**

Petitioner, Johnson agrees with Magistrate Judge Merz assertion, Petitioner states that his Motion for leave for extension of time was filed twenty(20) day's before the February 9<sup>th</sup>, 2019 due date, and was not an effort to thwart the judicial proceedings or a reckless disregard of the effect of its conduct on the proceedings. See *Amernational Indus. V. Action-Tungsum, Inc.*, 925 F. 2d 970, 978 (6<sup>th</sup> Cir. 1991) (quoting *INVST Financial Group, Inc. v. Chem-Nuclear System, Inc.*, 815 F. 2d. 391 (6<sup>th</sup> Cir. 1992)).

Petitioner avers that seeking an extension of time did not demonstrate an improper use of the process and therefore this court should have determined prior to the Court's February 15, 2019 order, adopting the Magistrate Judge Third Supplemental Report and Recommendation (ECF No. 82). As stated Petitioner, Johnson filed his motion for leave twenty (20) day's before the February 9, 2019 due date giving the Court, and the Magistrate Judge adequate time to deny Petitioner's Motion for leave for extension of time if the Court found that good cause did not exist to support Petitioner's Motion for leave for extension of time, that would have allowed Petitioner reasonable time to meet the February 9<sup>th</sup>, 2019 deadline.

Petitioner, Johnson states that, the Magistrate's notation order denying Petitioner's Motion for extension of time to file objections to Third Supplemental Report and Recommendations (ECF No. 84) eliminated "fairness" in the conduct of the Third Supplemental Report and Recommendation proceedings.

A District Court's denial of a Motion to enlarge time to file objections to a Magistrate Judge's Report and Recommendation is reviewed for an abuse of discretion. *Smith ex rel. Smith v. Severn*, 129 F. 3d 419, 424 (7<sup>th</sup> Cir. 1997); *Chandler v. Jackson*, No. 97-1016, 1997 U.S. App. Lexis 34875, 1997 WL 778152 (6<sup>th</sup> Cir. Dec 10, 1997) An abuse of discretion occurs when a district court fails to even consider the Motion for extension of time. *Thompson v. Superior Fireplace Co.*, 931 F. 2d. 372, 374 (6<sup>th</sup> Cir. 1991).

### Conclusion

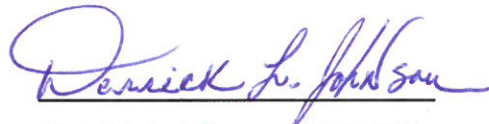
Reasonable Jurist would agree that Petitioner, Johnson filed his Motion for extension of time twenty(20) day's before the February 9<sup>th</sup>, 2019 due date, and Petitioner's Motion to Strike should be granted.



Derrick L. Johnson #254-768  
P.O. Box 209  
Orient, Ohio 43146

### CERTIFICATE OF SERVICE

A copy of Petitioner's Objections to the Magistrate Judge Report and Recommendation (ECF No.87) was sent by ordinary U.S. Mail to: Principal Assistant Attorney General Stephanie L. Watson (0063411) at: Criminal Justice Section 150 East Gay Street, 16<sup>th</sup> Fl. Columbus, Ohio 43215-6001 on this 12<sup>th</sup> day of February 2019.



Derrick L. Johnson #254-768



IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

DERRICK L. JOHNSON,  
Petitioner,

Case No.: 3:15- CV - 090

-Vs.-

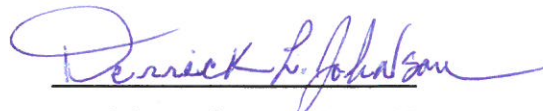
CHARLES BRADLEY, Warden,  
Respondent.

HONORABLE JUDGE  
WALTER H. RICE

MAGISTRATE JUDGE  
MICHAEL R. MERZ

**Declaration of Inmate Filing**

I am Petitioner, Derrick L. Johnson unskilled in the profession of Law confined in Pickaway Correctional Institution at: P.O. Box 209 Orient, Ohio 43146. Today, on the above day and date: February 18<sup>th</sup>, 2019, I am depositing Petitioner's Objections to Magistrate Judge Merz Report and Recommendations (ECF No. 87) in the Pickaway Correctional Institution's internal Mailing system. First class postage is being prepaid by Petitioner by way of an Institutional cash slip for postage. I declare under the penalty of perjury that the foregoing is true and correct (see Title 28 U.S.C. §1746, 18 U.S.C § 1621).



Derrick L. Johnson #254-768  
P.O. Box 209  
Orient, Ohio 43146